[Cite as *Clean Energy Future, L.L.C. v. Clean Energy Future-Lordstown, L.L.C.*, 2017-Ohio-9350.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

CLEAN ENERGY FUTURE, LLC,	:	**MEMORANDUM OPINION**
Plaintiff-Appellee,	:	**CASE NO. 2017-T-0110**
- vs -	:	
CLEAN ENERGY FUTURE-LORDSTOWN, LLC,	:	
Defendant-Appellant.	:	

Civil Appeal from the Trumbull County Court of Common Pleas.
Case No. 2017 CV 01636.

Judgment: Appeal dismissed.

Andrew C. Phelan, *pro hac vice*, Morgan Lewis & Bockius, LLP, One Federal Street, Boston, MA 02110; *Andrew James Barber*, Morgan Lewis & Bockius, LLP, One Oxford Centre, 32nd Floor, Pittsburgh, PA 15219 (For Plaintiff-Appellee).

Scott Edward North and *Kirsten Rene Fraser*, Porter Wright Morris & Arthur, LLP, 41 South High Street, Suites 2800-3200, Columbus, OH 43215 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} On November 30, 2017, Defendant-Appellant Clean Energy Future-Lordstown, LLC ("CEF-L"), filed a notice of appeal from the judgment of the Trumbull County Court of Common Pleas, which adopted the Magistrate's Decision and Recommendations of November 3, 2017. CEF-L filed a motion to stay the trial court's judgment, pending the outcome of this appeal, on December 15, 2017. This court granted a temporary stay on December 19, 2017. On December 28, 2017, Plaintiff-Appellee

Clean Energy Future, LLC ("CEF") filed a response to the motion to stay and has argued, inter alia, that the appealed entry is not a final appealable order.

{¶2} CEF commenced this action on September 20, 2017, for breach of contract, declaratory judgment, specific performance, and permanent injunctive relief regarding an Agreement for Option and Purchase of certain real property ("Option Agreement"). CEF also moved the trial court to enter a preliminary injunction requiring CEF-L to perform under the Option Agreement, including signing and consenting to the Fifth Addendum to the Declaration of Covenants and Restrictions for Lordstown Industrial Park. In an entry dated November 28, 2017, the trial court granted the preliminary injunction, stating:

> Until further ORDER of this Court, Defendant, [CEF-L] is mandated to immediately sign the acknowledgment and consent to the Fifth Addendum To Declaration Of Covenants And Restrictions For Lordstown Industrial Park that CEF provided to CEF-L for such signature. CEF-L is further mandated to comply fully with the Agreement For Option And Purchase dated April 6, 2016, including its assistance and cooperation provisions in Sections 7 and 22, and so is barred from taking any action that delays or interferes with, or in any aspect of, any effort by CEF to develop and build any aspect of any energy facility within the Lordstown Industrial Park, including but not limited to, the transfer of the property upon exercise of the option on or after January 1, 2018 by CEF. Plaintiff shall post a bond in the amount of One Hundred Thousand Dollars ($100,000.00).

{¶3} Pursuant to Section 3(B)(2), Article IV of the Ohio Constitution, a judgment of a trial court can be immediately reviewed by an appellate court only if it constitutes a "final order" in the action. *Germ v. Fuerst*, 11th Dist. Lake No. 2003-L-116, 2003-Ohio-6241, ¶3. If a lower court's order is not final, then an appellate court does not have jurisdiction to review the matter, and the matter must be dismissed. *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 20 (1989).

{¶4} "A preliminary injunction is a provisional remedy that is considered interlocutory, tentative, and impermanent in nature. As such, an order granting or denying

a preliminary injunction does not automatically qualify as a final appealable order." *Wells Fargo Ins. Servs. USA, Inc. v. Gingrich*, 12th Dist. Butler No. CA2011-05-085, 2012-Ohio-677, ¶5 (internal citations omitted). According to R.C. 2505.02(B)(4), a provisional remedy, such as an order granting a preliminary injunction, is a final appealable order only when both of the following apply:

> (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy;
>
> (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

Whether the granting of a preliminary injunction is a final appealable order is, therefore, dependent on the circumstances of each case.

{¶5} "The first of these requirements, R.C. 2505(B)(4)(a), has been deemed to be unmet where the trial court's order granting a preliminary injunction only serves to maintain the status quo pending litigation of the trial on the merits." *Cleveland Clinic Found. v. Orange Techs., L.L.C.*, 8th Dist. Cuyahoga Nos. 100011 & 100059, 2014-Ohio-211, ¶12, citing *McHenry v. McHenry,* 5th Dist. Stark No. 2013 CA 00001, 2013-Ohio-3693, ¶17, *Cleveland Firefighters*, *IAFF Local 500 v. E. Cleveland*, 8th Dist. Cuyahoga No. 88273, 2007-Ohio-1447, ¶5; *Hootman v. Zock*, 11th Dist. Ashtabula No. 2007-A-0063, 2007-Ohio-5619, ¶16; and *Deyerle v. Perrysburg*, 6th Dist. Wood No. WD-03-063, 2004-Ohio-4273, ¶15. "Status quo" has been defined as "'the last, actual, peaceable, uncontested status which preceded the pending controversy.'" *Aquasea Group, LLC v. Singletary*, 11th Dist. Trumbull No. 2013-T-0120, 2014-Ohio-1780, ¶11, quoting *Obringer v. Wheeling & Lake Erie Ry. Co.*, 3rd Dist. Crawford No. 3-09-08, 2010-Ohio-601, ¶19;

see also Quinlivan v. H.E.A.T. Total Facility Solutions, Inc., 6th Dist. Lucas No. L-10-1058, 2010-Ohio-1603, ¶5.

{¶6} CEF-L argues the trial court did not act to preserve the status quo because it orders CEF-L to take an affirmative action by signing the Fifth Addendum. The trial court explained that "[p]reserving the status quo in this situation requires an affirmative action, because the 'status quo' is the parties' rights and obligations under the Option Agreement." As the trial court explained,

> The language of the Option Agreement is unambiguous and requires CEF-L to 'reasonably assist in any capacity as requested by Purchaser (CEF) to facilitate Purchaser's intended use of the Option Property for Purchaser's Improvements…' and 'to cooperate … in good faith, and to deal fairly with one another, so as to effect the consummation of the transactions contemplated hereby…'. There is no conditional language in the option agreement. The only way to preserve the status quo – the obligations under the Option Agreement agreed to by both parties – is to require CEF-L to sign the Addendum. Ordering a party to act on a previously agreed upon contractual obligation is merely upholding and preserving the terms contained therein.

Based on the limited record before us, we do not disagree with the trial court's preliminary assessment of the lack of merit in appellant's position on this issue. We agree with the trial court that it has essentially acted to maintain the status quo. Assuming arguendo, however, that the status quo in this case has not been preserved, both prongs of R.C. 2505.02(B)(4) must be satisfied in order for the preliminary injunction to be a final order.

{¶7} Ohio courts generally hold that the second prong of R.C. 2505.02(B)(4) cannot be met when the provisional remedy is a preliminary injunction and the ultimate relief sought in the lawsuit is a permanent injunction. *See, e.g.*, *Hootman*, *supra*, at ¶15 (citation omitted); *RKI, Inc. v. Tucker*, 11th Dist. Lake No. 2017-L-004, 2017-Ohio-1516, ¶10; *Fatica Renovations, LLC v. Bridge*, 11th Dist. Geauga No. 2017-G-0106, 2017-Ohio-1419, ¶13. *See also Katherine's Collection, Inc. v. Kleski*, 9th Dist. Summit No. 26477,

2013-Ohio-1530, ¶17 (citation omitted) ("This Court has held that where, as here, the provisional remedy affected the type of claims and relief that are at the heart of the underlying litigation, the order determining the provisional remedy is not immediately appealable."); *Jacob v. Youngstown Ohio Hosp. Co.*, *LLC*, 7th Dist. Mahoning No. 11 MA 193, 2012-Ohio-1302, ¶24.

{¶8} "Moreover, it has been held that '[c]alculable monetary losses and losses incurred during the pendency of the case can be remedied by money damages at the conclusion of the case, so there is generally no right to an immediate appeal from the ruling on the preliminary injunction.'" *Aquasea Group, supra*, at ¶12, quoting *Cleveland Clinic Found., supra,* at ¶14. *See also Simmons v. Trumbull Cty. Engineer*, 11th Dist. Trumbull No. 2004-T-0016, 2004-Ohio-1663, ¶11 (where a party would be entitled to monetary damages for any loss suffered from a preliminary injunction, the order was not final).

{¶9} CEF-L asserts it will suffer an "average annual loss of $6.7 million" between the years 2021 and 2036 if it is required to comply with the trial court's preliminary injunction. This buttresses our determination that CEF-L will be afforded a meaningful and effective remedy at the conclusion of proceedings in this matter. Not only does CEF-L admit its asserted losses are monetary, it also indicates these losses will not come to fruition for another three years, likely well after this case has been finally decided on its merits.

{¶10} This is a preliminary injunction, one that is subject to "further order of the court." In addition, there is a pending motion in the trial court to refer the matter to arbitration based on a provision in the Option Agreement. CEF is ultimately seeking a permanent injunction, and CEF-L will have an opportunity to litigate the merits of its

defense to the request for permanent injunction with either an arbitrator or the trial court. Based on the record before us, we cannot conclude the trial court's preliminary order places CEF-L in a position where a delay in time will prevent it from obtaining meaningful and effective relief by appealing the final judgment. At the conclusion of the proceedings, if it is determined it was error to order CEF-L to sign the Fifth Addendum, the final arbiter will be in a position to fashion either a monetary or an equitable remedy granting relief to appellant, which could include rescission of the Fifth Addendum.

{¶11} This case is dissimilar to other scenarios where courts have held that no meaningful remedy exists because the inability to pursue an appeal would cause irreparable damage. Examples of such scenarios include when trade secrets may be revealed, privileged information may be disclosed, or business relationships with third parties may be destroyed. *See LCP Holding Co. v. Taylor*, 158 Ohio App.3d 546, 2004-Ohio-5324 (11th Dist.); *Callahan v. Akron Gen. Med. Ctr.*, 9th Dist. Summit No. 22387, 2005-Ohio-5103; *Bob Krihwan Pontiac–GMC Truck, Inc. v. General Motors Corp.,* 141 Ohio App.3d 777 (10th Dist.2001).

{¶12} Under the circumstances of this case, the requirements set forth in R.C. 2505.02(B)(4) have not been satisfied. The trial court's November 28, 2017 judgment entry is not a final appealable order. The appeal is dismissed, sua sponte, for lack of jurisdiction.

{¶13} Appeal dismissed.

CYNTHIA WESTCOTT RICE, P.J.,

THOMAS R. WRIGHT, J.,

concur.